

# Post Conviction Relief Practice

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- I. In General
  - a. What is a PCR?
    - i. A special quasi-civil remedy
    - ii. Where a convicted person can present alleged errors
    - iii. Which were not available or known at the time of the original trial or appeal
    - iv. Indiana Rules of Procedure of Post Conviction Remedies applies
  - b. What a PCR is not
    - i. Not a substitute for a direct appeal
    - ii. Not a device for investigating possible claims
    - iii. Not a device to address issues already decided on direct appeal
  - c. Right to Counsel
    - i. There is no “right” to counsel (See PCR Rule 9(a) & (c))
    - ii. A petitioner may choose to proceed pro se or to request the services of a public defender. He doesn’t get to do both!
      - 1. A petitioner who chooses to institute proceedings pro se cannot demand that the trial court act as lifeguard and rescue him later because, in hindsight, he believes that he made an incorrect choice.
      - 2. A defendant expressly informing the trial court that he did not wish the assistance of counsel cannot later cry foul because the trial court abided by his wishes.
      - 3. Cases:
        - a. **Curry v. State**, 643 N.E.2d 963 (Ind. Ct. App. 1994);
        - b. **Howard v. State**, 581 N.E.2d 925, 1991 Ind. LEXIS 223 (Ind. 1991)
- II. The Pleadings
  - a. The Petition
    - i. PCR Rule 3. Contents.
      - (a) The petition shall be submitted in a form in substantial compliance with the standard form appended to this Rule. The standard form shall be available without charge from the Public Defender's Office, who shall also see that the forms are available at every penal institution in this State
    - ii. See Appendix to PCR 1
  - b. The Answer
    - i. PCR Rule 4. Pleadings.
      - (a) Within thirty [30] days after the filing of the petition, or within any further reasonable time the court may fix, the state, by the Attorney General in capital

cases, or by the prosecuting attorney of non-capital cases, shall respond by answer stating the reasons, if any, why the relief prayed for should not be granted. The court may make appropriate orders for amendment of the petition or answer, for filing further pleadings or motions, or for extending the time of the filing of any pleading.

- ii. Respond immediately using the attached standard answer.
- iii. Failure to answer
  - 1. Does not entitle the defendant to relief
  - 2. The facts alleged in the Petition are deemed admitted
  - 3. Court still needs to determine whether as a matter of law, the petitioner is entitled to relief.
  - 4. Cases
    - a. Sholders v. State, 462 NE2d 1034 (Ind 1984)
    - b. Sedberry v. State, 610 NE2d 610 (Ind App 1993)
- iv. The Defenses available
  - 1. Waiver
    - a. PCR Rule 8. Waiver of or failure to assert claims.

All grounds for relief available to a petitioner under this rule must be raised in his original petition. Any ground finally adjudicated on the merits or not so raised and knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the petitioner has taken to secure relief, may not be the basis for a subsequent petition, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original petition.

- b. Generally, where an issue is available to a defendant on direct appeal but not pursued, it is waived for post-conviction review
- c. Exception would be where the trial court committed “fundamental error”
  - i. Deprivation of the 6<sup>th</sup> Amendment right to counsel
  - ii. An issue demonstrably unavailable to the petitioner at the time of his trial or her direct appeal
- d. Must plead it.
- e. Must prove it.
- f. But... the Court can find, *sua sponte*, that a procedural default of an issue is an appropriate basis to affirm the judgment below

## 2. Res Judicata

- a. An issue which is raised and determined adverse to petitioner's position is res judicata.
- b. Petitioner cannot disguise old arguments as new ones by using different language or new examples
- c. Just like "waiver" State should plead and prove "res judicata", but...
- d. Courts have determined on their own, whether specifically pleaded by the State or not, a post conviction petitioner is not entitled to further review of questions already decided upon.

### 3. Laches

- a. A doctrine which infers a legitimate waiver of the right to challenge a judgment.
- b. It is the intentional relinquishment of a known right, claim or privilege
- c. For laches to bar relief, the State must prove by a preponderance of the evidence:
  - i. That the petitioner unreasonably delayed in seeking relief and,
    - 1. petitioner had knowledge of existing conditions and acquiesced in them
    - 2. Ways of proving this element
      - a. The petitioner's filing of other PCR's
      - b. Continuous consultations with attorneys by the petitioner regarding other convictions
      - c. Access to law library and the filing of other pleadings
      - d. Comments to others that he was "getting a P.C." but never pursuing them
      - e. The petitioner has attained "Jailhouse Lawyer" status
      - f. Additional criminal/civil cases
  - ii. That the State has been prejudiced by the delay.
    - 1. State has to prove that a reasonable likelihood exists that a successful prosecution is materially diminished by the passage of time attributable to the petitioner's neglect.
    - 2. The State **does not** have to prove that it's impossible to present a case.

### 3. Examples

- a. Witnesses are deceased
- b. Witnesses have no independent recollection of the events surrounding the charge/conviction
- c. Unable to locate witnesses, files, evidence
  - i. State has an obligation to put forth some effort in its attempt to locate

### c. Summary Disposition

#### i. PCR Rule 4(g)

The court may grant a motion by either party for summary disposition of the petition when it appears from the pleadings, depositions, answers to interrogatories, admissions, stipulations of fact, and any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The court may ask for oral argument on the legal issue raised. If an issue of material fact is raised, then the court shall hold an evidentiary hearing as soon as reasonably possible.

- ii. Court can deny the petition if the pleadings conclusively show that the Petitioner is entitled to no relief

### d. Discovery

#### i. Obviously, the rule does anticipate discovery

Rule 4: "...when it appears from the pleadings, ***depositions, answers to interrogatories, admissions***, stipulations of fact, and any affidavits submitted,..."

#### ii. But...*Roche v State*, 690 NE2d 1115 (Ind 1997)

- 1. The Indiana Supreme Court held that discovery orders with a pending PCR case should be limited and not automatic (as it is in an active criminal case).
- 2. The Court reasoned that in most circumstances, the post conviction petitioner will be fully informed of the documentary source of the petitioner's claims.
- 3. The Court also stated that it is an abuse of the post-conviction process to use it to investigate possible claims rather than to vindicate actual claims.

### III. The Hearing

#### a. PCR Rule 5. Hearing.

The petition shall be heard without a jury. A record of the proceedings shall be made and preserved. All rules and statutes applicable in civil proceedings including pre-trial and discovery procedures are available to the parties. The court may receive affidavits, depositions, oral testimony, or other evidence and may at its discretion order the applicant brought before it for the hearing. The petitioner has the burden of establishing his grounds for relief by a preponderance of the evidence

- b. A hearing is generally required even if it is unlikely that the petitioner will produce evidence to establish his claim
- c. The petitioner bears the burden by a preponderance of the evidence that he is entitled to relief
- d. Witnesses may be presented
- e. When a Hearing is not required
  - i. When the petition conclusively demonstrates that the petitioner is entitled to no relief
  - ii. When the pleadings deal only with issues of law, not facts
- f. Rules of Evidence
  - i. Indiana Rules of Evidence generally apply (IRE 101(a)& (c))
  - ii. However, PCR Rule 5 specifically permits affidavits, thus maybe hearsay rules do not apply .
  - iii. The PCR Petition as Evidence
    - 1. The PCR petition may be considered as an affidavit if agreed to by the parties and court.
      - a. However, upon timely objection by the State, the petition may not be considered as evidence
    - 2. Regardless, a petitioner cannot prevail by resting on his verified pleading alone.

### IV. The Allegations

#### a. Ineffective Assistance of Counsel

- i. A claim of ineffective assistance of counsel requires the defendant to show by a preponderance of the evidence that
  - 1. counsel's performance was below the objective standard of reasonableness based on "prevailing" professional norms and
  - 2. The defendant was prejudiced by counsel's substandard performance, i.e. there is a "reasonable probability" that, but for counsel's errors or omissions, the outcome of the trial would have been different.
  - 3. Cases
    - a. *Stephenson v. State*, 864 N.E.2d 1022 (Ind. 2007);

- b. **Taylor v. State**, 840 N.E.2d 324 (Ind. 2006);
- c. **Strickland v. Washington** 466 US 668 (1984)

- ii. There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.
- iii. Counsel is afforded considerable discretion in choosing strategy and tactics, and these decisions are entitled to deferential review.
- iv. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective.
- v. The defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential.
  - 1. **State v. McManus**, 868 N.E.2d 778 Ind. 2007)
  - 2. **Stevens v. State**, 770 NE 2d 739 (Ind 2002)
  - 3. **Perez v. State**, 748 NE2d 858 (Ind. 2001)
  - 4. **Ben-Yisrayl v. State**, 738 NE 2d 253 (Ind 2000)
- vi. Ineffective Assistance of Appellate Counsel
  - 1. Same general **Strickland** evaluation
  - 2. There are three categories of alleged appellate counsel ineffectiveness:
    - a. denying access to an appeal,
    - b. failing to raise issues, and
      - i. A two-part test is used to evaluate these claims:
        - 1. whether the unraised issues are significant and obvious from the face of the record and
        - 2. whether the unraised issues are clearly stronger than the raised issues.
    - ii. When the claim of ineffective assistance is directed at appellate counsel for failing fully and properly to raise and support a claim of ineffective assistance of trial counsel, a defendant faces a compound burden on post conviction.
      - 1. The post conviction court must conclude that appellate counsel's performance was deficient and
      - 2. that, but for the deficiency of appellate counsel, trial counsel's performance would have been found deficient and prejudicial.
    - iii. In an appellate ineffective assistance of counsel case where counsel failed to raise certain issues, a reviewing

court should be particularly sensitive to the need for separating the wheat from the chaff in appellate advocacy, and should not find deficient performance when counsel's choice of some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made.

iv. Cases

1. **Fisher v. State**, 810 N.E.2d 674 (Ind. 2004);
2. **Timberlake v. State**, 753 N.E.2d 591 (Ind. 2001)

c. failing to present issues competently.

vii. Incompetent PCR Counsel

1. Not judged by the same standards as for the trial and appellate counsel of the criminal case.
2. The standard is whether "counsel in fact appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court"
3. A claim of defective performance in a post-conviction proceeding "poses no cognizable grounds for post-conviction relief."
4. There isn't a constitutional right to counsel in a PCR hearing
5. Cases
  - a. **Baum v. State**, 533 N.E.2d 1200(Ind. 1989)
  - b. **Graves v. State**, 823 N.E.2d 1193(Ind. 2005)

b. Plea was not knowingly and voluntarily given

- i. Plea should generally follow 35-35-1-2
- ii. A petitioner who claims that his plea was involuntary and unintelligent but can only establish that the trial judge failed to give an advisement in accordance with [§ 35-35-1-2](#) has not met his burden of proof.
- iii. He needs to plead specific facts from which a finder of fact could conclude by a preponderance of the evidence that the trial judge's failure to make a full inquiry in accordance with [§ 35-35-1-2\(a\)](#) rendered his decision involuntary or unintelligent.

1. **White v. State**, 497 N.E.2d 893, 1986 Ind. LEXIS 1263 (Ind. 1986)

- iv. The fact that the record of a guilty plea hearing can neither be found nor reconstructed does not of itself require granting post-conviction relief. Rather, as with any claim made in a petition for post-conviction relief, a claim that the petitioner's conviction was obtained in violation of federal or state constitutional safeguards, must be proven by a preponderance of the evidence

1. **Hall v. State**, 849 N.E.2d 466, 2006 Ind. LEXIS 477 (Ind. 2006)

- v. Unless the record reveals that the defendant knew or was advised at the time of his plea that he was waiving his right to a jury trial, his right of confrontation and his right against self-incrimination, *Boykin* will require that his conviction be vacated.
  1. **Boykin v. Alabama**, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274, 1969 U.S. LEXIS 1434 (1969)
  2. **State v. Eiland**, 723 N.E.2d 863, 2000 Ind. LEXIS 111 (Ind. 2000)
- vi. Factual Basis
  1. The failure to establish a factual basis for a guilty plea does not require that the conviction be vacated in every case.
  2. A post-conviction petitioner must, in addition to proving the lack of a factual basis, also prove that he was prejudiced by the lack of a factual basis.
    - a. Evidence proving that the petitioner did not commit the crime would meet this burden
    - b. Evidence establishing that the petitioner would not have pleaded guilty if a factual basis inquiry had been undertaken
    - c. **State v. Eiland**, 707 N.E.2d 314 (Ind. Ct. App. 1999); affirmed **State v. Eiland**, 723 N.E.2d 863 (Ind. 2000)
    - d.
- c. Erroneous sentence
  - i. Generally is a ground for a PCR
  - ii. However...
    1. Defendants who plead guilty to achieve favorable outcomes give up a plethora of substantive claims and procedural rights, such as challenges to convictions that would otherwise constitute double jeopardy. Striking a favorable bargain including a consecutive sentence the court might otherwise not have the ability to impose falls within this category.
    2. A defendant "may not enter a plea agreement calling for an illegal sentence, benefit from that sentence, and then later complain that it was an illegal sentence
    3. **Lee v. State**, 816 N.E.2d 35, 2004 Ind. LEXIS 898 (Ind. 2004)
- d. Newly Discovered Evidence
  - i. The Legal test to be applied
    1. that the evidence has been discovered since the trial;
    2. that it is material and relevant;
    3. that it is not cumulative;
    4. that it is not merely impeaching;
    5. that it is not privileged or incompetent;

6. that due diligence was used to discover it in time for trial;
  7. that the evidence is worthy of credit;
  8. that it can be produced upon a retrial of the case; and
  9. that it will probably produce a different result.
- ii. However, If the PCR is from a guilty plea
1. It is inconsistent to allow defendants who pleaded guilty to use post-conviction proceedings to later revisit the integrity of their plea in light of alleged new evidence seeking to show that they were in fact not guilty.
  2. A defendant knows at the time of his plea whether he is guilty or not to the charged crime.
  3. With a trial court's acceptance of a defendant's guilty plea, the defendant waives the right to present evidence regarding guilt or innocence.
  4. This constitutes a waiver under Ind. R.P. Post-Conviction Remedies 1, § 1(a)(1), 8.
    - a. **Norris v. State**, 896 N.E.2d 1149 (Ind. 2008);
    - b. **Alvey v. State**, 911 N.E.2d 1248 (Ind. 2009)

V. Practice Tips

- i. The petitioner can be your best witness.
- ii. Hold the petitioner to their burden of proof
- iii. Make the petitioner follow the law
- iv. Educate the Judge (as best as you can)
- v. Don't forget your affirmative defenses
- vi. Pay attention to PCR filings
- vii. Discovery goes both ways
- viii. Don't forget your Motion for Summary Disposition
- ix. Always file an answer to the PCR
- x. Concede/negotiate legitimate PCR's

# **Indiana Rules of Court**

## **Rules of Post-Conviction Remedies**

*Including Amendments Received Through January 1, 2009*

### **Rule PC 1. Post-Conviction Relief**

#### **Section 1. Remedy -- To whom available -- Conditions.**

(a) Any person who has been convicted of, or sentenced for, a crime by a court of this state, and who claims

(1) That the conviction or the sentence was in violation of the Constitution of the United States or the constitution or laws of this state;

(2) That the court was without jurisdiction to impose sentence;

(3) That the sentence exceeds the maximum authorized by law, or is otherwise erroneous;

(4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint;

(6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy;

may institute at any time a proceeding under this rule to secure relief.

(b) This remedy is not a substitute for a direct appeal from the conviction and/or the sentence and all available steps including those under P.C. 2 should be taken to perfect such an appeal. Except as otherwise provided in this rule, it comprehends and takes the place of all other common law, statutory, or other remedies heretofore available for challenging the validity of the conviction or sentence and it shall be used exclusively in place of them.

(c) This Rule does not suspend the writ of habeas corpus, but if a person applies for a writ of habeas corpus in the county where the person is incarcerated and challenges the validity of his conviction or sentence, that court shall transfer the cause to the court in which the conviction took place, and the latter court shall treat it as a petition for relief under this Rule.

(d) A petition filed by a person who has been convicted or sentenced for a crime by a court of this state that seeks to require forensic DNA testing or analysis of any evidence, whether denominated as

a petition filed pursuant to Ind. Code § 35-38-7-5 or not, is considered a Petition for Post-Conviction Relief.

(e) A petition seeking to present new evidence challenging the person's guilt or the appropriateness of the person's sentence, when brought by a person who has been sentenced to death and who has completed state post-conviction review proceedings, whether denominated as a petition filed pursuant to Ind. Code § 35-50-2-9(k) or not, is considered a Successive Petition for Post-Conviction Relief under Section 12 of this Rule.

## **Section 2. Filing.**

A person who claims relief under this Rule or who otherwise challenges the validity of a conviction or sentence must file a verified petition with the clerk of the court in which the conviction took place, except that a person who claims that the person's parole has been unlawfully revoked must file a verified petition with the clerk of the court in the county in which the person is incarcerated. Three (3) copies of the verified petition must be filed and no deposit or filing fee shall be required.

The Clerk shall file the petition upon its receipt and deliver a copy to the prosecuting attorney of that judicial circuit. In capital cases, the clerk shall, in addition to delivering a copy of the petition to the prosecuting attorney, immediately deliver a copy of the petition to the Attorney General. If an affidavit of indigency is attached to the petition, the clerk shall call this to the attention of the court. If the court finds that the petitioner is indigent, it shall allow petitioner to proceed in forma pauperis. If the court finds the indigent petitioner is incarcerated in the Indiana Department of Correction, and has requested representation, it shall order a copy of the petition sent to the Public Defender's office.

## **Section 3. Contents.**

(a) The petition shall be submitted in a form in substantial compliance with the standard form appended to this Rule. The standard form shall be available without charge from the Public Defender's Office, who shall also see that the forms are available at every penal institution in this State.

(b) The petition shall be made under oath and the petitioner shall verify the correctness of the petition, the authenticity of all documents and exhibits attached to the petition, and the fact that he has included every ground for relief under Sec. 1 known to the petitioner.

(c) The Clerk shall file documents and information excluded from public access pursuant to Administrative Rule 9(G)(1) in accordance with Trial Rule 5(G).

## **Section 4. Pleadings.**

(a) Within thirty [30] days after the filing of the petition, or within any further reasonable time the court may fix, the state, by the Attorney General in capital cases, or by the prosecuting attorney of non-capital cases, shall respond by answer stating the reasons, if any, why the relief prayed for should

not be granted. The court may make appropriate orders for amendment of the petition or answer, for filing further pleadings or motions, or for extending the time of the filing of any pleading.

(b) Within ten [10] days of filing a petition for post-conviction relief under this rule, the petitioner may request a change of judge by filing an affidavit that the judge has a personal bias or prejudice against the petitioner. The petitioner's affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be accompanied by a certificate from the attorney of record that the attorney in good faith believes that the historical facts recited in the affidavit are true. A change of judge shall be granted if the historical facts recited in the affidavit support a rational inference of bias or prejudice. For good cause shown, the petitioner may be permitted to file the affidavit after the ten [10] day period. No change of venue from the county shall be granted. In the event a change of judge is granted under this section, the procedure set forth in Ind. Criminal Rule 13 shall govern the selection of a special judge.

(c) At any time prior to entry of judgment the court may grant leave to withdraw the petition. The petitioner shall be given leave to amend the petition as a matter of right no later than sixty [60] days prior to the date the petition has been set for trial. Any later amendment of the petition shall be by leave of the court.

(d) If the petition is challenging a sentence imposed following a plea of guilty, the court shall make a part of the record the certified transcript made pursuant to Rule CR-10.

(e) In the event that counsel for petitioner files with the court a withdrawal of appearance accompanied by counsel's certificate, see Section 9(c), the case shall proceed under these rules, petitioner retaining the right to proceed pro se in forma pauperis if indigent. Thereafter, the court may order the State Public Defender to represent an indigent incarcerated petitioner if the court makes a preliminary finding that the proceeding is meritorious and in the interests of justice.

(f) If the State Public Defender has filed an appearance, the State Public Defender shall have sixty (60) days to respond to the State's answer to the petition filed pursuant to Rule PC 1(4)(a). If the pleadings conclusively show that petitioner is entitled to no relief, the court may deny the petition without further proceedings.

(g) The court may grant a motion by either party for summary disposition of the petition when it appears from the pleadings, depositions, answers to interrogatories, admissions, stipulations of fact, and any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The court may ask for oral argument on the legal issue raised. If an issue of material fact is raised, then the court shall hold an evidentiary hearing as soon as reasonably possible.

#### **Section 5. Hearing.**

The petition shall be heard without a jury. A record of the proceedings shall be made and preserved. All rules and statutes applicable in civil proceedings including pre-trial and discovery procedures are

available to the parties. The court may receive affidavits, depositions, oral testimony, or other evidence and may at its discretion order the applicant brought before it for the hearing. The petitioner has the burden of establishing his grounds for relief by a preponderance of the evidence.

#### **Section 6. Judgment.**

The court shall make specific findings of fact, and conclusions of law on all issues presented, whether or not a hearing is held. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to arraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper. This order is a final judgment.

#### **Section 7. Appeal.**

An appeal may be taken by the petitioner or the state from the final judgment in this proceeding, under rules applicable to civil actions. Jurisdiction for such appeal shall be determined by reference to the sentence originally imposed. The Supreme Court shall have exclusive jurisdiction in cases involving an original sentence of death and the Court of Appeals shall have jurisdiction in all other cases.

#### **Section 8. Waiver of or failure to assert claims.**

All grounds for relief available to a petitioner under this rule must be raised in his original petition. Any ground finally adjudicated on the merits or not so raised and knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the petitioner has taken to secure relief, may not be the basis for a subsequent petition, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original petition.

#### **Section 9. Counsel.**

(a) Upon receiving a copy of the petition, including an affidavit of indigency, from the clerk of the court, the Public Defender may represent any petitioner committed to the Indiana Department of Correction in all proceedings under this Rule, including appeal, if the Public Defender determines the proceedings are meritorious and in the interests of justice. The Public Defender may refuse representation in any case where the conviction or sentence being challenged has no present penal consequences. Petitioner retains the right to employ his own counsel or to proceed pro se, but the court is not required to appoint counsel for a petitioner other than the Public Defender.

(b) In the event petitioner elects to proceed pro se, the court at its discretion may order the cause submitted upon affidavit. It need not order the personal presence of the petitioner unless his presence is required for a full and fair determination of the issues raised at an evidentiary hearing. If the pro se petitioner requests issuance of subpoenas for witnesses at an evidentiary hearing, the petitioner shall specifically state by affidavit the reason the witness' testimony is required and the substance of the witness' expected testimony. If the court finds the witness' testimony would be relevant and probative, the court shall order that the subpoena be issued. If the court finds the

proposed witness' testimony is not relevant and probative, it shall enter a finding on the record and refuse to issue the subpoena. Petitioners who are indigent and proceeding in forma pauperis shall be entitled to production of guilty plea and sentencing transcripts at public expense, prior to a hearing, if the petition is not dismissed. In addition, such petitioners shall also be entitled to a record of the post-conviction proceeding at public expense for appeal of the denial or dismissal of the petition.

(c) Counsel shall confer with petitioner and ascertain all grounds for relief under this rule, amending the petition if necessary to include any grounds not included by petitioner in the original petition. In the event that counsel determines the proceeding is not meritorious or in the interests of justice, before or after an evidentiary hearing is held, counsel shall file with the court counsel's withdrawal of appearance, accompanied by counsel's certification that 1) the petitioner has been consulted regarding grounds for relief in his pro se petition and any other possible grounds and 2) appropriate investigation, including but not limited to, review of the guilty plea or trial and sentencing records, has been conducted. Petitioner shall be provided personally with an explanation of the reasons for withdrawal. Petitioner retains the right to proceed pro se, in forma pauperis if indigent, after counsel withdraws.

(d) State. In non-capital cases, the prosecuting attorney of the circuit in which the court of conviction is situated shall represent the State of Indiana in the court of conviction. In capital cases, the Attorney General shall represent the State of Indiana for purposes of answering the petition, and the prosecuting attorney shall, at the request of the Attorney General, assist the Attorney General. The Attorney General shall represent the State of Indiana on any appeal pursuant to this Rule.

#### **Section 10. Subsequent prosecution.**

(a) If prosecution is initiated against a petitioner who has successfully sought relief under this rule and a conviction is subsequently obtained, or

(b) If a sentence has been set aside pursuant to this rule and the successful petitioner is to be resentenced, then the sentencing court shall not impose a more severe penalty than that originally imposed unless the court includes in the record of the sentencing hearing a statement of the court's reasons for selecting the sentence that it imposes which includes reliance upon identifiable conduct on the part of the petitioner that occurred after the imposition of the original sentence, and the court shall give credit for time served.

(c) The provisions of subsections (a) and (b) limiting the severity of the penalty do not apply when:

(1) a conviction, based upon a plea agreement, is set aside;

(2) the state files an offer to abide by the terms of the original plea agreement within twenty (20) days after the conviction is set aside; and

(3) the defendant fails to accept the terms of the original plea agreement within twenty (20) days after the state's offer to abide by the terms of the original plea agreement is filed.

## **Section 11. Definition.**

Whenever "Public Defender" is mentioned herein, it shall mean the public defender of the state of Indiana as defined by statute.

## **Section 12. Successive petitions.**

(a) A petitioner may request a second, or successive, Petition for Post-Conviction Relief by completing a properly and legibly completed Successive Post-Conviction Relief Rule 1 Petition Form in substantial compliance with the form appended to this Rule. Both the Successive Post-Conviction Relief Rule 1 Petition Form and the proposed successive petition for post-conviction relief shall be sent to the Clerk of the Indiana Supreme Court, Indiana Court of Appeals, and Tax Court.

(b) The court will authorize the filing of the petition if the petitioner establishes a reasonable possibility that the petitioner is entitled to post-conviction relief. In making this determination, the court may consider applicable law, the petition, and materials from the petitioner's prior appellate and post-conviction proceedings including the record, briefs and court decisions, and any other material the court deems relevant.

(c) If the court authorizes the filing of the petition, it is to be (1) filed in the court where the petitioner's first post-conviction relief petition was adjudicated for consideration pursuant to this rule by the same judge if that judge is available, and (2) referred to the State Public Defender, who may represent the petitioner as provided in Section 9(a) of this Rule. Authorization to file a successive petition is not a determination on the merits for any other purpose and does not preclude summary disposition pursuant to Section (4)(g) of this Rule. [1] Criminal Rule 10

## APPENDIX TO RULE PC 1

In the            Court of            County  
   State of Indiana

Full name of Movant

Case No.

Prison Number (if any)            (To be supplied by the

v.            clerk of the court)

State of Indiana, Respondent.

### INSTRUCTIONS--READ CAREFULLY

In order for this motion to receive consideration by the court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified before a person authorized to administer oaths, and it shall set forth in concise form the answers to each applicable question. If necessary, petitioner may furnish his answer to a particular question on the reverse side of the page or an additional blank page. Petitioner shall make it clear to which question any such continued answer refers.

This motion must be filed in the court which imposed sentence.

Under the provisions of Post-Conviction Remedy Rule 1, petitioner is required to include in this motion every ground known to him for vacating, setting aside or correcting his conviction and sentence. Be sure to include every ground.

Since every motion must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should therefore exercise care to assure that all answers are true and correct.

If the motion is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that petitioner will be unable to pay costs of the proceedings. When the motion is completed, *the original and two copies* shall be mailed to the clerk of the court from which he was sentenced.

1. Place of detention, if detained

If not, present address

If not, present address

2. Name and location of court which, and name of judge who, imposed sentence

3. The case number and the offense or offenses for which sentence was imposed

4. The date upon which sentence was imposed and the terms of the sentence

5. Was the finding of guilty made:

( ) After a plea of guilty? OR

( ) After a plea of not guilty?

6. Did you appeal from the judgment of conviction?

( ) Yes ( ) No

7. If you answered "yes" to (6), list:

(a) The name of the court to which you appealed:

(b) The result in such court and the date of such result:

8. State concisely all the grounds known to you for vacating, setting aside or correcting your conviction and sentence. (See Rule PC 1, Sec. 1a)

(a)

(b)

(c)

(If you have more grounds, use reverse side or separate sheet. However, if this is a successive petition for post-conviction relief, you may submit no more than fifteen (15) additional pages, double-spaced, to provide supporting facts. You may also submit exhibits.)

9. State concisely and in the same order the facts which support each of the grounds set forth in (8).

(a)

(b)

(c)

10. Prior to this petition, have you filed with respect to this conviction:

(a) Any petition for post conviction relief pursuant to Post-Conviction Remedy Rule 1 or 2?

☐ Yes      ☐ No

(b) Any petitions for habeas corpus in state or federal courts?

☐ Yes      ☐ No

(c) Any petitions in the United States Supreme Court for certiorari?

☐ Yes      ☐ No

(d) Any other petitions, motions or applications in this or any other court?

☐ Yes      ☐ No

11. If you answered "yes" to any part of (10), list with respect to each petition, motion or application:

(a) Its specific nature:

i.

ii.

iii.

(b) The name and location of the court in which each was filed:

i.

ii.

iii.

(c) The disposition of the petition, motion or application and the date of disposition:

i.

ii.

iii.

(d) If known, citations of any written opinions or orders entered pursuant to each disposition:

i.

ii.

iii.

12. Has any ground set forth in (8) been previously presented to this or any other court, *state or federal*, in any petition, motion or application which you have filed?

☐ Yes      ☐ No

13. If you answered "yes" to (12), identify:

(a) Which grounds have been previously presented:

- i.
- ii.
- iii.

(b) The proceedings in which each ground was raised:

- i.
- iii.
- iii.

14. Were you represented by an attorney at any time during the course of:

(a) Your preliminary hearing?

( ) Yes                      ( ) No

(b) Your arraignment and plea?

( ) Yes                      ( ) No

(c) Your trial, if any?

( ) Yes                      ( ) No

(d) Your sentencing?

( ) Yes                      ( ) No

(e) Your appeal, if any, from the judgment of conviction or the imposition of sentence?

( ) Yes                      ( ) No

(f) Preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

( ) Yes                      ( ) No

15. If you answered "yes" to one or more parts of (14), list:

(a) The name and address of each attorney who represented you:

- i.
- ii.
- iii.

(b) The proceedings at which each such attorney represented you:

- i.
- ii.
- iii.

(c) Was said attorney:

☐ Appointed by the court? OR

☐ Of your own choosing?

16. Have you completed service of the challenged sentence?

☐ Yes                      ☐ No

17. Have you retained an attorney to represent you in this proceeding?

☐ Yes                      ☐ No

18. If you are without sufficient funds to employ counsel and are incarcerated in the Indiana Department of Correction, the Public Defender may represent you. If you check "NO" you lose the right to representation by the State Public Defender for the duration of this proceeding, including any appeal therefrom.

(a) Do you wish to have the Public Defender represent you?

☐ Yes                      ☐ No

(b) If yes, have you completed the Affidavit of Indigency attached to this form, stating your salary, if any, amount of savings, and all property owned by you?

☐ Yes                      ☐ No

Signature of Petitioner

State of                      SS:

County of

I, \_\_\_\_\_, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing petition; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this motion; and that the matters and allegations therein set forth are true.

Signature of Affiant

Subscribed and sworn to before me this      day of      , 19      .

Notary Public

My Commission Expires:

(month) (day) (year)

#### AFFIDAVIT OF INDIGENCY

(See instructions page 1 of this form)

Signature of Petitioner

State of      SS:

County of

I,      , being first duly sworn upon my oath, depose and say that I have subscribed to the foregoing affidavit; that I know the contents thereof; and that the matters therein set forth are true.

Signature of Affiant

Subscribed and sworn to before me this      day of      , 19      .

Notary Public

My Commission Expires:

(month) (day) (year)

FORM FOR SUCCESSIVE POST-CONVICTION  
RELIEF RULE 1 PETITIONS

(To Be Filed With Petition For Post-Conviction Relief)

IN THE COURT OF COUNTY  
STATE OF INDIANA

)

Full Name of Petitioner )

) Case No.

Prison Number (if any) ) (To be supplied by the

v. ) Clerk of the Court)

State of Indiana, Respondent)

INSTRUCTIONS--READ CAREFULLY

If you have previously filed a Petition for Post-Conviction Relief directed to this conviction or these convictions and the earlier petition was decided on the merits, you must fill out this form and file it along with your Petition. It must be legibly handwritten or typewritten, signed by the petitioner before a person authorized to take oaths and properly notarized. Since this must be signed under oath, any false statement of a material fact

herein may serve as the basis of prosecution and conviction for perjury. Exercise care to be sure all answers are true and correct.

You must mail the original and two copies of this form along with your petition to the Clerk of the Supreme Court and Court of Appeals, 200 West Washington Street, Room 216, Indianapolis, IN 46204-2732. The Clerk will refer your petition to the Supreme Court in death penalty cases and the Indiana Court of Appeals in all other cases. The court will then decide whether your petition may be filed in the trial court where your first Post-Conviction Remedy Rule 1 petition was adjudicated.

NOTE: The court will allow a second or successive petition for post-conviction relief to be filed if the petitioner establishes a reasonable possibility that the petitioner is entitled to post-conviction relief. However, a petitioner does not establish a reasonable possibility that the petitioner is entitled to post-conviction relief where, for example, (1) if the petitioner only alleges grounds for relief that are not different from those which have already been decided on the merits, or (2) if the only grounds alleged, even if different, should have been alleged in an earlier proceeding.

In addition to this form, you may submit no more than fifteen (15) pages, double-spaced, to provide supporting facts. You may also submit exhibits. Any citation of authorities should be avoided and is only appropriate if there has been a *change in the law* since the judgment you were attacking was entered. *Your answer(s) should be confined to relevant facts* and must not include legal arguments.

1. Were you represented by an attorney on your prior Petition for Post-Conviction Relief? Yes      No      If yes, name(s) and address(es) of attorney(s).

Proceedings at which each attorney represented you:

Drafting Petition for Post-Conviction Relief

Hearing of Petition for Post-Conviction Relief

Appeal of denial of Petition for Post-Conviction Relief

2. Was there a hearing on your prior Petition? Yes      No

3. If the Petition was denied, did you appeal? Yes      No

If yes, please state result on appeal, date of decision and citation of case if known:

4. If you were alleging ground(s) for relief which were raised in your previous Petition, explain why you feel consideration is merited:

5. If your Petition raises *new* grounds which were not included in your prior Petition, explain why you are raising these grounds now. Your explanation should rely on FACTS, not your opinions or conclusions:

Signature of Petitioner

STATE OF                    )    SS:

COUNTY OF                    )

I,                    , being duly sworn upon my oath, depose and say that I have subscribed to the foregoing; that I know the contents thereof; and that the matters and allegations set forth are true.

Signature of Affiant-Petitioner

Subscribed and sworn to before me, a Notary Public, this       day of       ,  
20   .

STATE OF INDIANA            )  
  )  
COUNTY OF FLOYD         )  
  
STATE OF INDIANA  
  
V.  
  
Kerry C. Wilson

IN THE FLOYD CIRCUIT COURT  
  
CAUSE NO. 22D01-0409-MR-686  
              22D01-0906-PC-00008

**STATE’S ANSWER TO PETITION FOR POST CONVICTION RELIEF**

Comes now the State of Indiana by its Chief Deputy Prosecuting Attorney, Steven Owen, pursuant to Post-Conviction Relief Rule 1 Section 4(A) and answers the Petition for Post-Conviction Relief filed in this case follows:

1.       The State is without sufficient information to admit or deny paragraphs 1 through 7 and paragraphs 10 through 18.
2.       The State denies paragraphs 8 and 9.
3.       The State presents the affirmative defense of laches, waiver, and res judicata.

WHEREFORE, the State of Indiana respectfully requests that the Court deny the Petitioner’s Petition for Post Conviction Relief and for all other just and proper relief duly found in the premises.

Respectfully Submitted,

---

Steven Owen #10363-59  
Chief Deputy Prosecuting Attorney  
52<sup>nd</sup> Judicial Circuit  
Room #249 City County Building  
New Albany, IN 47150  
812-948-5422

**CERTIFICATE OF SERVICE**

I hereby certify that on the 30th day of June, 2009, a true and accurate copy of the foregoing motion was served upon Kerry C. Wilson, inmate, Wabash Correctional Unit, P.O. Box 1111, Carlisle, Indiana 47836 by first-class, postage prepaid, United States mail, in accordance with the Indiana Rules of Trial Procedure.

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Steven Owen #10363-59  
Chief Deputy Prosecuting Attorney

STATE OF INDIANA       )  
                                      )  
COUNTY OF FLOYD       )

IN THE FLOYD SUPERIOR COURT  
  
CAUSE NO. 22D01-9108-CF-189

JAMES LEE RODGERS III

V.

STATE OF INDIANA

**STATE’S MOTION FOR SUMMARY DISPOSITION**

Comes now the State of Indiana by its Chief Deputy Prosecuting Attorney, Steven Owen, and pursuant to PCR 1 Section 4 (f) & (g), does now request this Court for a summary disposition, and would show the Court the following:

1. That the above named petitioner has filed in essence, a Petition for Post Conviction Relief in this Court. The Respondent has filed its response.
2. That the pleadings conclusively show that the petitioner is entitled to no relief.
3. That from all the pleadings that have been filed in this case, there are no genuine issues of a material fact or facts.
4. The State of Indiana is entitled to judgment as a matter of law.
5. Oral arguments are not necessary in this case.

THEREFORE, the State of Indiana respectfully requests that the Court, without hearing, grant a summary disposition based upon the pleadings filed in favor of the State of Indiana, deny the Petitioner’s Petition for Post Conviction Relief and for all other just and proper relief duly found in the premises.

Respectfully Submitted,

---

Steven Owen #10363-59  
Chief Deputy Prosecuting Attorney  
52<sup>nd</sup> Judicial Circuit  
Room #249 City County Building  
New Albany, IN 47150  
812-948-5422

### **CERTIFICATE OF SERVICE**

I hereby certify that on the 24th day of June, 2008, a true and accurate copy of the foregoing motion was served upon the attorney for the defendant, J. Christopher Sturgeon, 141 E. Spring Street, New Albany IN 47150 by first-class, postage prepaid, United States mail, in accordance with the Indiana Rules of Trial Procedure.

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Steven Owen #10363-59  
Chief Deputy Prosecuting Attorney